

**IN THE MATTER OF:  
BELAY TESFAMARIAM**

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## I. STATEMENT OF THE CASE

In Petition No. S-2833, Belay Tesfamariam seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 1000 Heartfields Drive, Silver Spring, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The legal description of the property is Lot 1, Block A, Section 3, in the Sherbrooke Subdivision. The tax account number is 03328093.

On February 21, 2012, the Board of Appeals issued a notice of a public hearing before the Hearing Examiner for May 17, 2012. Exhibit 12(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report<sup>1</sup> dated May 9, 2012 (Exhibit 15), recommended approval of the special exception with conditions.

Timothy Pillgreen, Housing Code Inspector for the Department of Housing and Community Affairs (DHCA), inspected the property on May 2, 2012, and reported his findings in a memorandum dated May 14, 2012 (Exhibit 16). The inspector noted that the accessory apartment provides 538 square feet of habitable space and concluded that occupancy must be limited to no more than two (2) unrelated persons or a family not to exceed three (3) people.

The hearing went forward as scheduled on May 17, 2012, and Petitioner appeared *pro se*. Petitioner adopted the findings in the Technical Staff Report (Exhibit 15) and the Housing Code Inspector's Report (Exhibit 16) as his own evidence and agreed to meet all the conditions set forth in both reports. Petitioner executed an Affidavit of Posting (Exhibit 19). Timothy Pillgreen, Housing Code Inspector for DHCA, also testified. Grant DeMeritte, who resides on Heartfields Drive, testified in opposition to the Petition.

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<sup>1</sup> The Technical Staff report is frequently quoted and paraphrased herein.

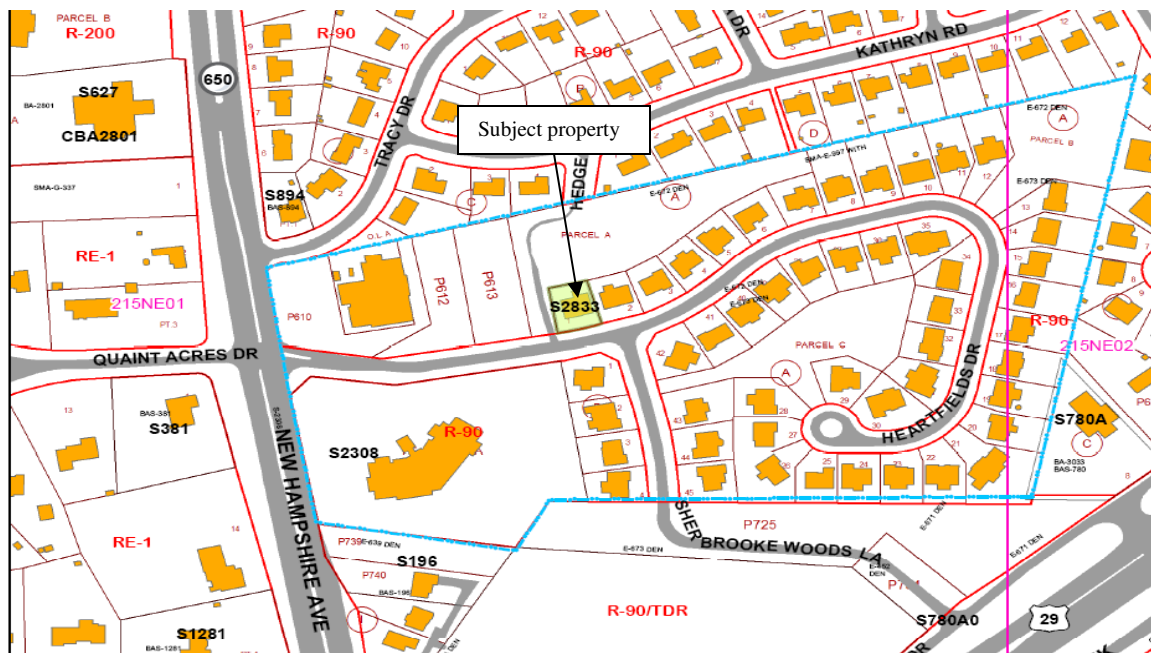
The record was held open until May 29, 2012, to give time to the Court Reporter to produce the hearing transcript and for Petitioner to supply a copy of his deed. The record closed as scheduled on May 29, 2012, with no further documents other than the transcript and Petitioner's deed<sup>2</sup> (Exhibit 21(a)) being received.

For the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

## II. FACTUAL BACKGROUND

### A. The Subject Property and Its Current Use

The subject property is located at 1000 Heartfields Drive, Silver Spring, Maryland, on the north side of Heartfields Drive in the northwest quadrant with the intersection of Sherbrooke Woods Lane, as shown below on the Zoning Map (Exhibit 15, Attachment 2) provided by Staff:



<sup>2</sup> Petitioner mistakenly provided a copy of the Deed of Trust instead of the deed. This error was not discovered until after the record closed. The record was opened and closed on June 13, 2012, for the purpose of allowing Petitioner to supply a copy of his deed.

Technical Staff described the property as follows (Exhibit 15, p. 2):

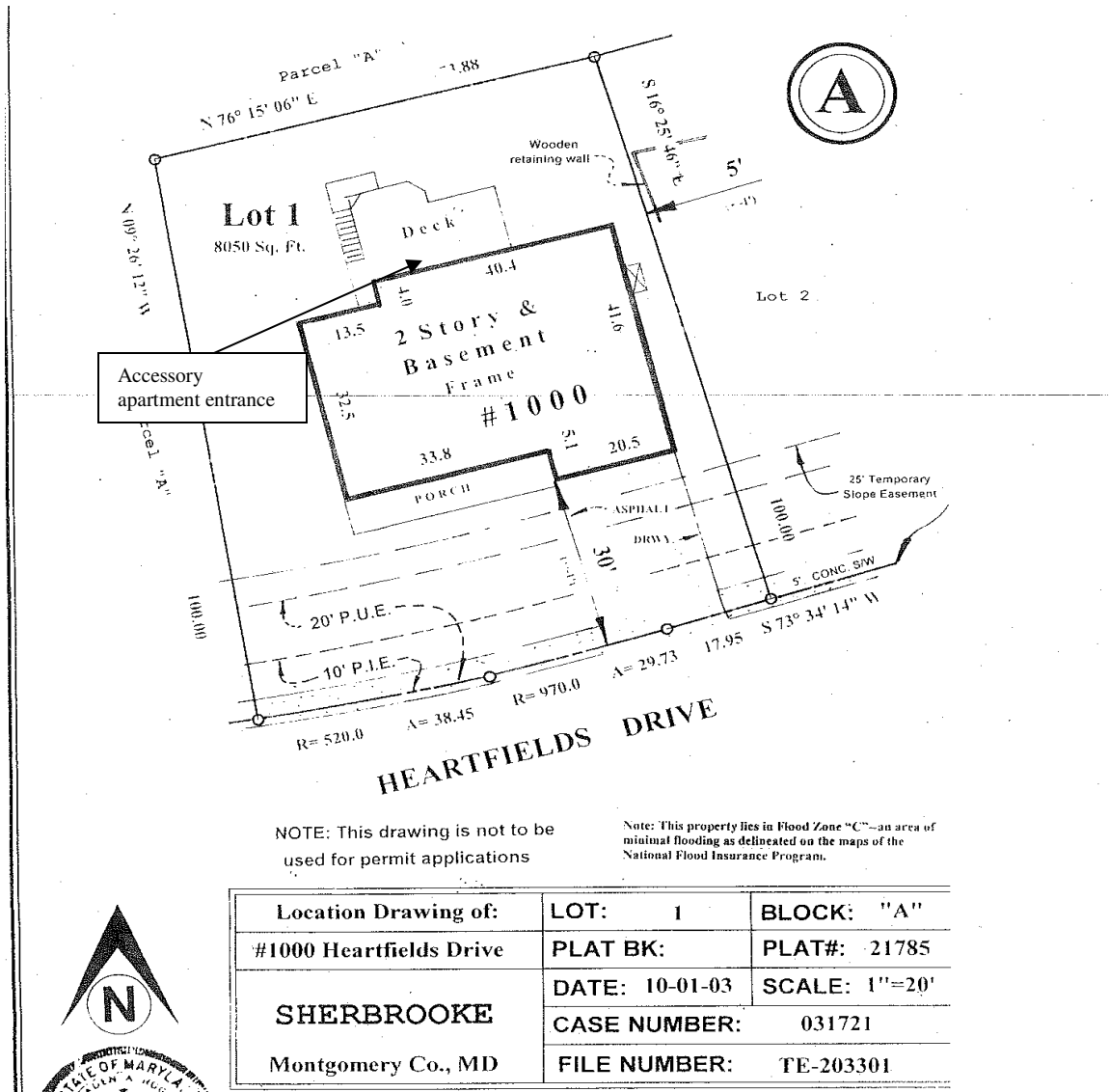
The site is described as Lot 1, Block A, “Sherbrooke,” fronts on Heartfields Drive and has a relatively flat front yard, with multiple shrubs and shade trees along the front and sides of the property. There is a significant slope from the house’s front façade towards the back yard. There are sidewalks along Heartfields Drive, and there is adequate on-site lighting. Vehicular access to this site is via Heartfields Drive (see figure 1).

Staff provided an aerial view of the property (Exhibit 15, p.3), as shown below:



The property is in the R-90 zone. The lot is approximately 8,050 square feet in size and is improved with a two-story single-family home with a basement and a two-car garage.

The home was built in 2001. The Site Plan<sup>3</sup> is shown below (Exhibit 3):

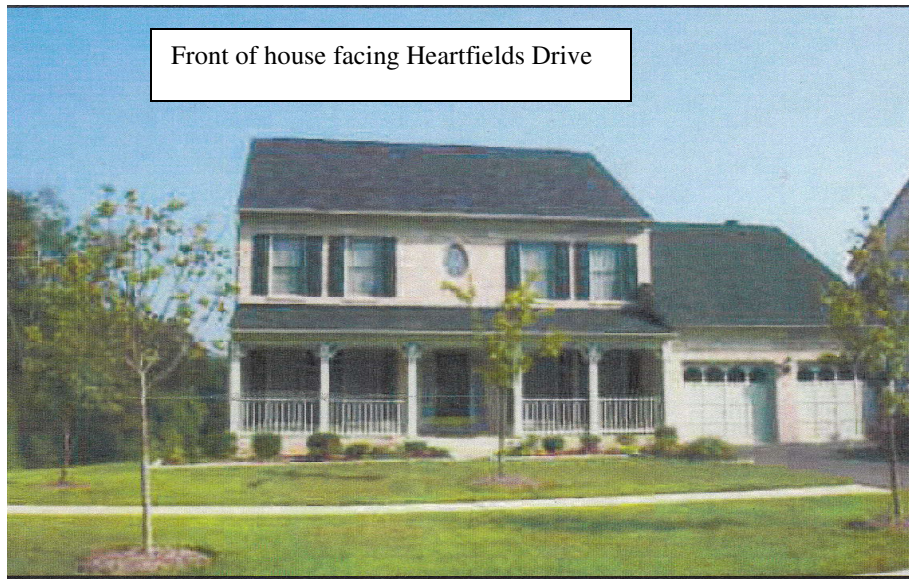


<sup>3</sup> The Site Plan does not reflect the location of the asphalt driveway, referred to as a "pedestrian pathway" in the Staff report (Exhibit 15), or the flagstone pathway previously shown in the aerial photograph of the site on page 4 of this report. Petitioner provided an up-close photograph of these paths (Exhibit 17) on page 9 of this report. Petitioner clearly identified both pathways on the Landscape and Lighting Plan (Exhibit 6) which is shown in on page 11 of this report.



Technical Staff reports that the total enclosed floor area of the home, including the 943 square-foot basement, is approximately 3,000 square feet. Exhibit 15, p. 11.

Photographs of the front and rear of the property, provided by Petitioner (Exhibit 9<sup>4</sup>), are reproduced below:



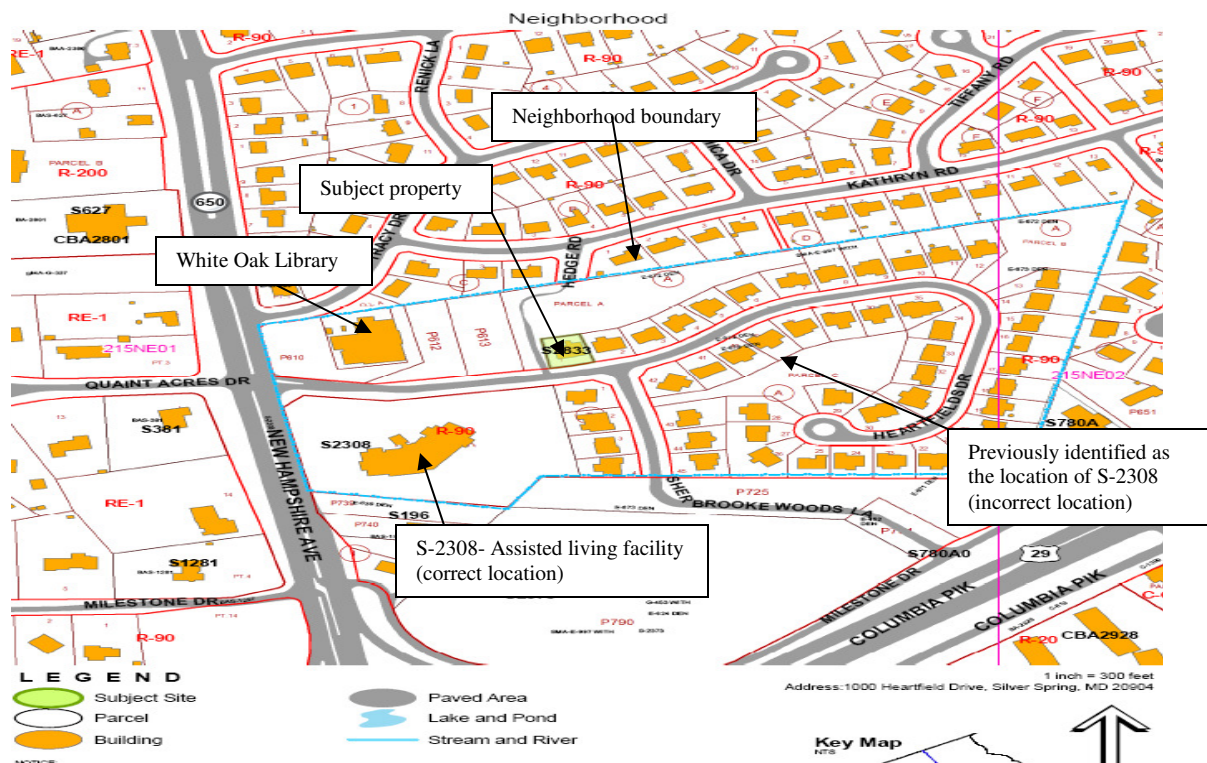
Rear of house



<sup>4</sup> These photographs are also shown as Attachment 3 in the Technical Staff report (Exhibit 15).

## B. The Surrounding Neighborhood

Technical Staff defined the general neighborhood by the following boundaries which the Hearing Examiner accepts: Kathryn Road to the north, Colombia Pike (US 29) to the south and east, and New Hampshire Avenue (MD 650) to the west. Staff advises that the neighborhood “consists primarily of residential dwellings zoned R-90.” Exhibit 15, p. 2. Staff also reported “[t]here are two non-residential uses within the neighborhood, the White Oak Library, and an assisted living facility; both zoned R-90. No other special exception for an accessory apartment exists in the neighborhood.” *Id.* The neighborhood boundary, depicted with a solid line on a Map supplied by Staff (Exhibit 15, Attachment 2<sup>5</sup>), is shown below:



<sup>5</sup> Technical Staff provided an updated Zoning Map to show the correct location of the assisted living facility (S-2308) as noted above.

The Hearing Examiner concurs with Technical Staff's conclusion that "[t]he addition of this special exception will not result in an excessive concentration of special exception uses in general or accessory apartments in particular, and will not adversely affect the area or alter its residential character." Exhibit 15, p. 6.

### **C. The Master Plan**

The subject property lies within the *White Oak Master Plan*, approved and adopted in 1997. Exhibit 8. Technical Staff advises that there are no Master Plan recommendations relevant to this site. However, Technical Staff noted "[a] major land use objective of this plan is to preserve and increase the housing resources for people of varying income, ages, and lifestyles, and continue to provide a variety of housing types that will permit households with changing needs to find suitable accommodation within the White Oak Master Plan area." Exhibit 15, p. 3. Staff noted that in addition to avoiding excessive concentrations of special exception uses along major transportation routes, "the Master Plan recommends special exception uses within residential communities be compatible with their surroundings, maintaining front yard setback." *Id.*

Technical Staff found the "proposed special exception is consistent with the Master Plan objectives, as the [Petitioner] is not proposing to alter the existing residential appearance of the property to accommodate this request, and the front yard setbacks will not be altered." Exhibit 15, p. 4. The Hearing Examiner agrees with Technical Staff's conclusion because the Plan supports R-90 zoning in which accessory apartments are a permitted special exception use. In addition, there is sufficient on-site parking (driveway and garage) to accommodate the proposed use. More importantly, the accessory apartment is not visible from the street and therefore does not change the existing structure's appearance as a single-family dwelling



consistent with the surrounding neighborhood. Since the exterior of Petitioner's home will not be changed, it will retain the residential appearance and compatibility sought by the Master Plan. The Hearing Examiner finds that the proposed use is consistent with the *White Oak Master Plan*.

#### **D. The Proposed Use**

Petitioner is requesting approval of an existing accessory apartment located in the basement of his home. Technical Staff advises that the apartment occupies 943 square feet out of approximately 3,000 square feet of floor area of his two-story single-family home. Petitioner will occupy the main dwelling (upper two floors) and a family member or close friend will occupy (rent) the one-bedroom accessory apartment. Exhibit 4; Tr. 14.

Technical Staff reports (Exhibit 15, p. 3):

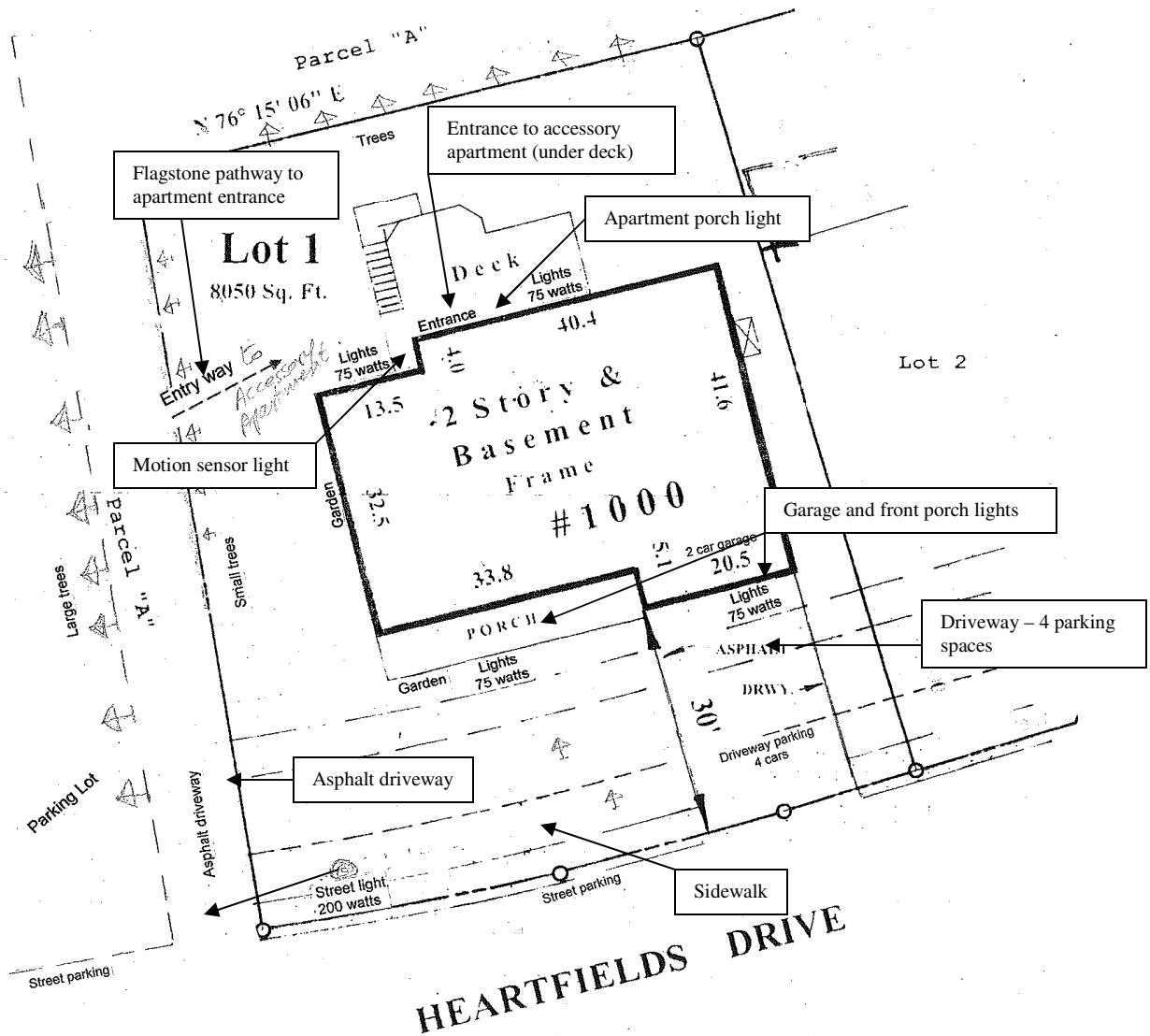
Access to the main structure is by a concrete path from the driveway. A separate entrance to the proposed accessory apartment is located on the northern side of the residence. Access to the accessory apartment is from a pedestrian path, leading to Heartfields Drive. The door is illuminated with standard residential-type lighting, and there is a flagstone pathway leading into the apartment (see Attachment 3).

Access to accessory apartment is shown below in photographs provided by the Petitioner (Exhibit 17):



The Landscaping and Lighting plan (Exhibit 6), as shown below, reflects the location of the existing landscaping and residential lighting on the property (Exhibit 6) and street lighting located on Heartfields Drive at the entrance to the asphalt driveway:

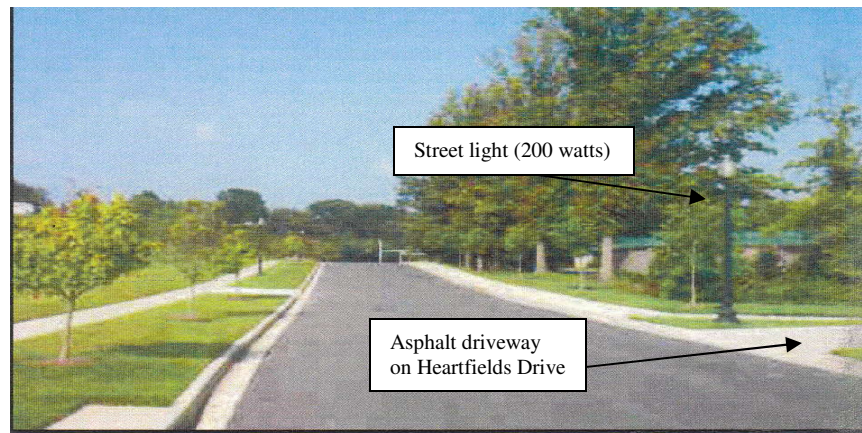
Existing:- Trees, Exterior lights, Garden  
Parking:- Driveway (4 cars), on-street (+ 4 cars)



# Landscape Lighting Plan

EXHIBIT NO. 6

The exterior lighting is located to the left of the accessory apartment door, under the deck on the northwest corner of the house (motion sensor), at the main dwelling front door and over the garage door. The asphalt driveway, as shown below in the photograph provided by Petitioner (Exhibit 9), will be illuminated by an existing street light located on Heartfields Drive.



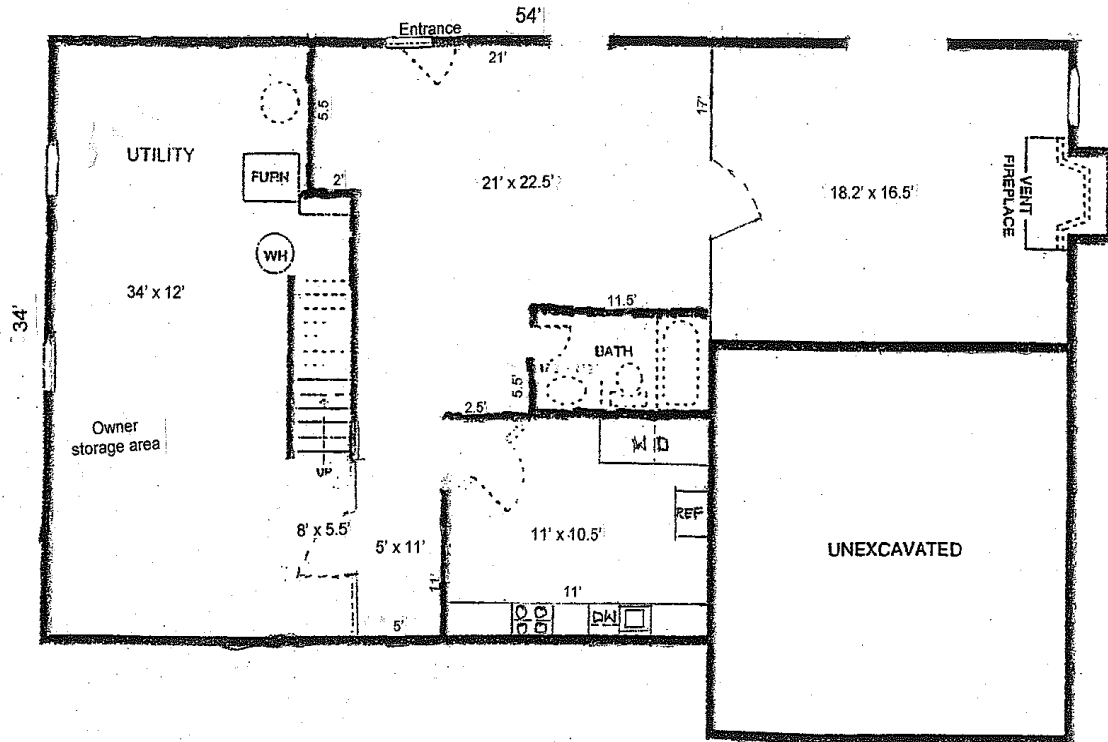
Technical Staff described the on-site lighting as adequate and found “the entrance into the accessory apartment is illuminated with typical residential outdoor lighting [and] that no direct light would intrude into any adjacent residential property.” Exhibit 15, p. 9. Further, Staff found the residential character of house and neighborhood will be maintained because “[t]he applicant is not proposing exterior modifications as the apartment will be completely contained within the existing structure.” Exhibit 15, p. 5. The Hearing Examiners agrees with Staff and so finds that the dwelling will maintain its residential character with typical residential outdoor lighting.

The accessory apartment Floor Plan (Exhibit 5), as shown on the next page, includes a living/dining area, kitchen, one bedroom, bathroom and den.<sup>6</sup>

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<sup>6</sup> The Housing Inspector identified this area as part of a broad hallway and not a separate room. Tr. 20.

Accessory Apartment floor plan drawn to scale  
Lower level of house



Accessory Apartment Living Area (sq. ft.)

Bed Room -	18.2' x 16.5'	= 300.3
Living/dining -	21' x 22.5'	= 472.5
Den -	5' x 11'	= 55
Kitchen -	11' x 10.5'	= 115.5
		<u>943.3 sq ft</u>

DHCA inspected the property on May 2, 2012. Housing Code Inspector, Timothy Pillgreen reported his findings in a memorandum dated May 14, 2012 (Exhibit 16):

The preliminary inspection was conducted May 2, 2012. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Install electric stove in kitchen.
2. The Accessory Apartment is 538 square feet. 150 square feet for the first person and 100 square feet for each [additional] person. A family of three or two unrelated people may live in the unit.
3. There is off street parking for 4 vehicles.

Petitioner agreed to comply with the conditions of approval, and will install an electric stove in the kitchen. Exhibit 4; Tr. 10 and 27.

Technical Staff reported that the “driveway can accommodate up to four (4) parked vehicles, plus two in the garage.” Exhibit 15, p. 2. Staff also observed “that most residents in the neighborhood park in their driveways leaving ample on-street parking for the proposed use.” Exhibit 15, p. 13. The Hearing Examiner agrees with Staff that there is adequate off-street parking for the accessory apartment on the driveway and in the garage as well as additional on-street and so finds.

### **E. Traffic Impacts**

Technical Staff found that the proposed special exception “satisfies the Local Area Transportation Review [LATR] and the Policy Area Mobility Review [PAMR] tests, and would not have any adverse effects on the roadway or nearby pedestrian facilities.” Exhibit 15, p. 4. Transportation Staff reported (Exhibit 15, Attachment 5):

The proposed accessory apartment within the existing single-family detached unit generates one additional (or two total) peak-hour vehicular trips within both the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.). A traffic study is not required to satisfy LATR because the proposed land use generates fewer than 30 peak-hour trips within the weekday morning and evening peak periods.

Although a development located in the Fairland/White Oak Policy Area must mitigate 45% of their new site-generated vehicular trips, PAMR mitigation is not required because the proposed accessory apartment generates fewer than three new peak-hour trips.

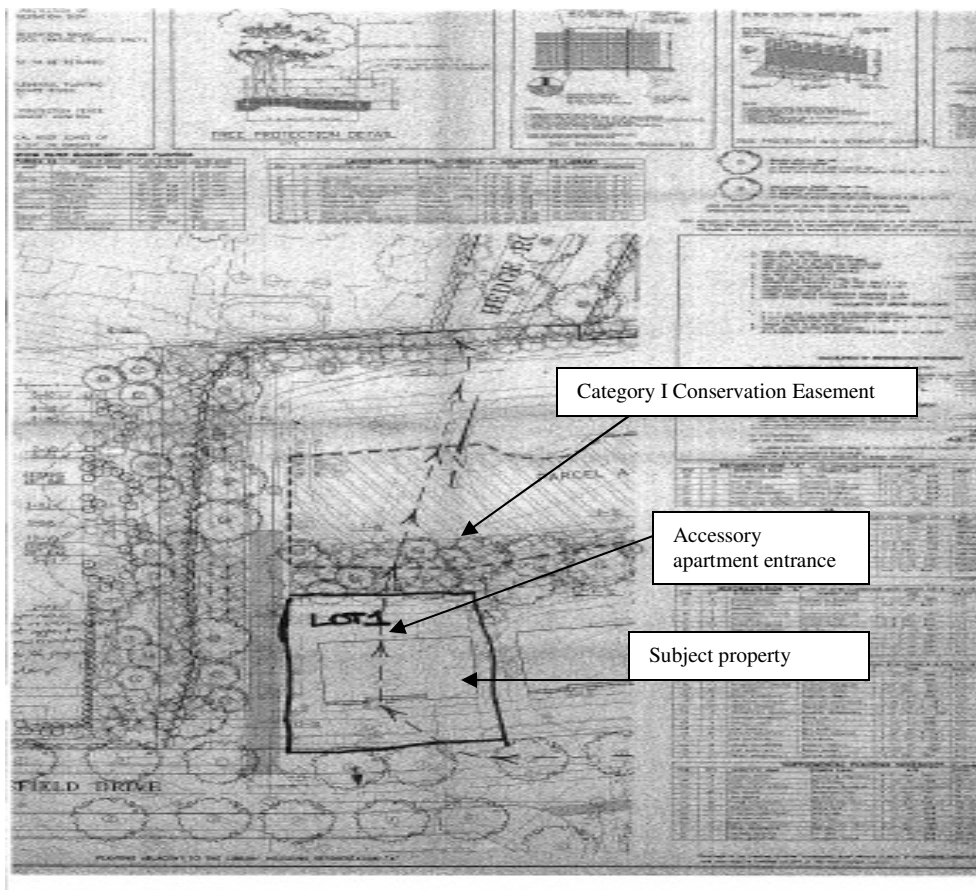
Due to the small scale of the proposed use, the Hearing Examiner has no basis in this record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment satisfies the LATR and PAMR tests and will have no adverse impacts on the area roadways and pedestrian facilities. There being no evidence in the



record to the contrary, the Hearing Examiner so finds.

### F. Environmental Impacts

Technical Staff advises that Petitioner's property "is a part of the Kaufman Property Preliminary Plan (11980960<sup>7</sup>) that contains an approved Final Forest Conservation Plan [and] is adjacent to a Category I Conservation Easement." Exhibit 15, p. 2. Thus, Petitioner's property "is located within a Final Forest Conservation Plan (11980960), as defined by Chapter 22A." Exhibit 15, p. 4. A copy of the Final Forest Conservation Detail Sheet (Exhibit 13(a)), as it relates to Petitioner's property, is shown below.



<sup>7</sup> According to the Final Forest Conservation Detail Sheet titled "Kaufman Property" (Exhibit 13(a)), the Preliminary Plan number is listed as #1-98096.

Technical Staff reports (Exhibit 15, p. 9):

There are no forest conservation issues identified with the proposed use. The site is subject to a Final Forest Conservation Plan (119980960) and the subject site is adjacent to a Category I Conservation Easement. There is no proposed construction and the proposed special exception does not conflict with the Final Forest Conservation Plan.

Based on this evidence, and having no evidence in the record to the contrary, the Hearing Examiner finds that Petitioner's request will have no adverse environmental impacts and it does not conflict with the approved Final Forest Conservation Plan.

### **G. Community Response**

Mr. Grant DeMeritte, who lives on Heartfields Drive on the lot immediately adjacent to Petitioner's lot, testified on his own behalf as a resident of the Sherbrooke neighborhood. Tr. 40. Mr. DeMeritte opposed the petition because he believes the Sherbrooke Homeowners Association, Inc., Articles of Incorporation, Bylaws, and Covenants, ("HOA Covenants") prohibits Petitioner from leasing a portion of his home. Exhibit 18. He specifically cited Section 7.8.F of the HOA Covenants which states, in pertinent part, "[n]o portion of any dwelling (other than the entire dwelling) shall be leased." Exhibit 18, p. 18; Tr. 40-41. Mr. DeMeritte believed, based on information received from a neighbor who contacted the County about the hearing, that the County would not approve Petitioner's request if it violated "anything in the organization's documents." Tr. 44-45. Mr. DeMeritte also opposed Petitioner's request because he and a number of his neighbors<sup>8</sup> "think it would be a dangerous precedent to allow rental units within houses in [their] development." Tr. 49-50

The Hearing Examiner explained that private covenants on the land are not matters for the Zoning authorities to determine; rather they are subject to court resolution. Case law also

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<sup>8</sup> No letters of support or in opposition from the community (or other residents) were received prior to or during the hearing.

holds that the Zoning authority should not be deterred by the private covenant, but rather should act on the zoning issues based on the Zoning Ordinance. As stated by the court in

*Perry v. Board of Appeals*, 211 Md. 294, 299-300, 127 A.2d 507, 509 (1956),

The [zoning] ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither is it controlled in its working or effects by such rights. The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attendant circumstances. Many times the covenant relied on may not have been originally effective or for many reasons may have ceased to be effective at the time relief is sought. 2 *Rathkopf, The Law of Zoning and Planning*, p. 387, says: “**The validity of the zoning ordinance, the grant of a variance or ‘exception’ should be considered independently of its effect upon covenants and restrictions in deeds.**” [Emphasis added.]

Petitioner’s property is located in the R-90 zone which permits accessory apartments as a special exception use. Zoning Ordinance § 59-C-1.31(a). Thus, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment use and not based on private covenants. Similarly, the decision on a zoning application can not be based on whether the idea of having an accessory apartment or “rental units” in the neighborhood is unpopular. The decision on a zoning application “is not a plebiscite.”

*Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

The Hearing Examiner finds that the points raised by Mr. DeMeritte do not form the basis for denying the special exception petition before the Hearing Examiner for the reasons stated herein.

### III. SUMMARY OF THE HEARING

Petitioner testified at the public hearing in support of the petition. DHCA Housing Code Inspector, Mr. Timothy Pillgreen, also testified as to compliance with the Housing Code. Petitioner’s adjacent neighbor, Grant DeMeritte, testified in opposition to the petition.

### **A. Petitioner's Case**

#### **1. Petitioner Belay Tesfamariam:**

Petitioner executed an affidavit of posting (Exhibit 19). Petitioner did not produce a copy of his deed at the hearing which he agreed to supply before the close of the record.<sup>9</sup> Petitioner adopted the findings in the Technical Staff Report (Exhibit 15) and the Housing Code Inspector's Report (Exhibit 16) as his own evidence and agreed to meet all the conditions set forth in both reports. Tr. 9-11.

Petitioner testified that has owned the property for more than eight years.<sup>10</sup> There are four bedrooms in the main dwelling and one bedroom in the finished basement where the accessory apartment is located. Petitioner lives alone and because of his medical issues he wants to be able to provide an independent living space (accessory apartment) for a family member or close friend who could provide the necessary medical assistance in an emergency. Tr. 13-14. He indicated that the most likely occupant will be a family member and that he will continue to reside in the main dwelling. Tr. 15. Petitioner agreed to abide by the occupancy restrictions for the accessory apartment which is limited to no more than two unrelated people or a family of three based on 538 square-feet of habitable space. Tr. 27.

Petitioner presented and identified three photographs depicting access to the accessory apartment (asphalt driveway and flagstone pathway) which is located on the west side of the property. Exhibit 17. The asphalt driveway is about the length of 10 cars and is illuminated by a 200 watt street light located on Heartfields Drive. The flagstone pathway (off the asphalt

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<sup>9</sup> See footnote 2.

<sup>10</sup> According to Petitioner's deed, recorded November 5, 2008 (Liber 36178 Folio 145), Petitioner and another individual, Meaza Gebreselassie, took title to the property as "tenants by the entirety" on October 3, 2003, which was a mistake because the parties were not married. On July 10, 2008, both parties executed a "No consideration-No Title Insurance Deed" thereby transferring sole ownership of the property to Petitioner. Exhibit 21(a). Staff confirmed through a search of the Maryland state tax records that Petitioner is the sole owner of the property as of November 5, 2008. Exhibit 15, p.12.

driveway) is located on the northwest corner of the property and is illuminated by a motion sensor light on the corner of the house. There is a porch light to the left of the accessory apartment door which is under the main deck. Petitioner identified additional exterior lighting, as seen on the Landscape and Lighting Plan (Exhibit 6), at the main entrance (front porch) and over the two-car garage door. Tr. 18-26. Petitioner identified additional photographs of the front, side and rear of his property as seen in Exhibit 9. Tr. 19. Petitioner testified that he is not proposing any exterior changes to the property and identified the accessory apartment Floor Plan (Exhibit 5). Tr. 20-21.

Petitioner testified that there was space on the driveway for four vehicles and two additional parking spaces in the two-car garage. Access to the rear of the property from the driveway is via the front sidewalk to the asphalt driveway to the flagstone pathway to the accessory apartment entrance. Tr. 23.

### **B. Public Agency Testimony**

#### Housing Code Inspector Timothy Pillgreen:

Timothy Pillgreen, DHCA Housing Code Inspector, testified that he inspected the property on May 2, 2012, and his findings are set forth in his report dated May 14, 2012 (Exhibit 16). He confirmed that the apartment measured 538 square-feet of habitable space thereby limiting occupancy to two unrelated people or a family of three. Tr. 20 and 34. He reported the unit was well-kept and there were no code violations. Tr. 29. Mr. Pillgreen confirmed the measurements for the accessory apartment living areas, as shown on the Floor Plan (Exhibit 5), are accurate and the windows meet the building code requirements. The bedroom is the only area where sleeping is permitted. Tr. 31-35.



Mr. Pillgreen also found there was adequate parking on the large driveway for four vehicles in addition to two vehicles in the garage and available on-street parking. Tr. 30. He reported that the access to the accessory apartment (sidewalk to asphalt driveway and flagstone pathway) is clear and meets code requirements. The pathway is illuminated by the existing exterior lighting. Tr. 35-36.

### **C. Opposition Testimony**

#### Grant DeMeritte:

Mr. Grant DeMeritte, who lives on Heartfields Drive on the lot immediately adjacent to Petitioner's lot, testified on his own behalf as a resident of the Sherbrooke neighborhood. Tr. 40. Mr. DeMeritte asked for clarification on the Forest Conservation exemption (Exhibit 7), noting that the development had an approved Forest Conservation Plan that included a conservation easement. The Hearing Examiner confirmed that the property was part of an approved Final Forest Conservation Plan and that Staff had found that Petitioner's request did not conflict with the approved plan or easement. Tr. 11-12.

Mr. DeMeritte opposed the petition because he believes the HOA Covenants prohibit Petitioner from leasing a portion of his home. Exhibit 18. He specifically cited Section 7.8.F of the HOA Covenants, which states in pertinent part, "[n]o portion of any dwelling (other than the entire dwelling) shall be leased." Exhibit 18, p. 18; Tr. 40. Mr. DeMeritte believed, based on information received from a neighbor who contacted the County about the hearing, that the County would not approve Petitioner's request if it violated "anything in the organization's documents." Tr. 44-45. Mr. DeMeritte also opposed Petitioner's request because he and a number of his neighbors "think it would be a dangerous precedent to allow rental units within houses in [their] development." Tr. 49-50

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception if he complies with the recommended conditions. Exhibit 15.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use as long as Petitioner complies with the recommended conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code Section 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code Section 59-G-1.21. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects,

alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 15, p.4):

- (1) The existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit;
- (2) The provision within the apartment of the necessary facilities, spaces and floor area to qualify as a habitable space under the Building Code;
- (3) Provision of a separate entrance and walkway and sufficient lighting;
- (4) Provision of sufficient parking;
- (5) The existence of an additional household on the site; and
- (6) Additional activity from that household, including the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an

additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found that there are no non-inherent adverse effects arising from the accessory apartment. Technical Staff summarized the rationale for this finding as follows (Exhibit 15, p. 5):

Staff finds that the size, scale, and scope of the requested use are minimal, and that any noise, traffic, neighborhood disruption, or environmental impacts associated with the use would be slight. There are no unusual characteristics of the site. Staff concludes that there are no non-inherent, adverse effects arising from the accessory apartment sufficient to form a basis for denial.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use.

## **B. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

### **Sec. 59-G-1.21. General conditions.**

**§59-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31(a).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a*

*proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the *White Oak Master Plan*, approved and adopted in 1997. For reasons set forth in Part II.C of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home located in the R-90 zone, is consistent with the goals and objectives of the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment is located in the walk-out basement of an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There will be sufficient off-street parking (four spaces



on the driveway and two in the garage) as well available on-street parking on Heartfields Drive. Transportation Staff found that traffic conditions will not be affected adversely by the proposed use. There are no other accessory apartments or similar uses in the defined neighborhood and the addition of the proposed accessory apartment will not adversely affect the residential character of the neighborhood. Exhibit 15, p. 6. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the surrounding residential neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in the previous section of this report, the Hearing Examiner agrees and so finds that the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the proposed use will not cause any objectionable noise, vibrations, fumes, odors, dust, or physical activity. Additionally, Staff found the on-site lighting adequate, residential in character and “that no direct light would intrude into any adjacent residential property.” Exhibit 15, pp. 6

and 9. There will be a light fixture at both the front door to the main dwelling and accessory apartment entrance in the rear of the house. The flagstone pathway will be illuminated with existing lighting located on the northwest rear corner of the house. The sidewalk and asphalt driveway will be illuminated by the street light on Heartfields Drive. Exhibit 6. Based on this record, the Hearing Examiner finds that the use will be indoors and residential, and that it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The defined neighborhood (Exhibit 15, Attachment 2), zoned R-90, consists of 49 single-family detached home and two non-residential uses, the White Oak library and an assisted living facility. Technical Staff found “[t]he addition of this special exception will not result in an excessive concentration of special exception uses in general or accessory apartments in particular, and will not adversely affect the area or alter its residential character.” Exhibit 15, p. 6. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area. The Hearing Examiner concurs with Technical Staff and so finds that the proposed special exception will not increase the number, scope, or intensity of special

exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 15, p. 7), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (i) the determination of adequate public facilities for the site is not currently valid for an impact that is the same or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will*

*be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. E of this report, Transportation Planning Staff conducted such reviews, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. For the same reason, the PAMR is also satisfied. Transportation Planning Staff also advised that “PAMR mitigation is not required because the proposed accessory apartment generates fewer than three new peak-hour trips.” Exhibit 15, Attachment 5. Therefore, the Hearing Examiner finds that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the proposed use satisfies transportation related requirements and will not reduce the safety of vehicular or pedestrian traffic. Exhibit 15, p. 7. Based on the evidence of record, especially given the availability of sufficient off-street parking spaces (four on driveway and two in garage) and ample on-street parking on Heartfields Drive, and the limited number of additional trips generated by the special exception, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

### ***C. Specific Standards***

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 15), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.00. Accessory apartment.***

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

##### ***(a) Dwelling unit requirements:***

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a*

*separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of an existing single-family detached dwelling, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 2001. Exhibit 4 and Exhibit 15, p. 10. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The use as proposed does not violate any of the provisions of this subsection; a requirement that occupancy of both the main house and the accessory apartment meet all Code requirements will be a condition of this approval.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through an existing separate exterior entrance door located in the rear of the dwelling which does not require any modifications to accommodate the special exception use. There will thus be no change to the residential appearance of the dwelling.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet. The 1,200 square feet limitation does not apply to an accessory apartment located in a separate existing accessory structure located on the same lot as the main dwelling. The maximum floor area for a separate existing accessory structure must be less than 50 percent of the total floor area of the main dwelling, or 2,500 square feet, whichever is less.*

Conclusion: The accessory apartment is approximately 943 square feet (with habitable space of 538 square feet) and below the 1,200 square-foot maximum for an accessory apartment. The main dwelling, including the finished basement, has a total floor area of approximately 3,000 square feet. Staff found that the accessory apartment, at 943 square feet, was “approximately 31% of the [total floor]

area.” Exhibit 15, p. 11. Thus, the Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling.

**59-G § 2.00(b) *Ownership Requirements***

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: Petitioner will reside and occupy the main dwelling (upper two floors) on the property. Exhibit 4; Tr. 14 and 26.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: Petitioner’s deed, recorded November 5, 2008, shows that Petitioner became sole owner of the property in 2008. Exhibit 21(a). The one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: Petitioner is listed as the sole owner of the property according to the deed dated July 10, 2008, and recorded November 5, 2008 (Exhibit 21(a)).

According to Technical Staff, Maryland state tax records show that



Petitioner is the owner of the property. Exhibit 15, p. 12. According to Petitioner's deed, Petitioner originally purchased the property in 2003 with another individual, Meaza Gebreselassie. The parties held title to the property as "tenants by the entirety" even though they were not married. On July 10, 2008, the parties executed a deed to correct this mistake in title and both parties conveyed sole ownership of the property to Petitioner. Therefore, the Hearing Examiner concludes that this condition has been met.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

**59-G § 2.00(c) Land Use Requirements**

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject property consists of a single lot that is approximately 8,050 square feet in size, and therefore satisfies this requirement. Staff advised that "the site is located in the R-90 Zone, and developed as a Cluster Development." Exhibit 15, p.8. Staff provided a chart, shown below in the next section (D. Additional Applicable Standards), which demonstrates compliance with the R-90 Zone Cluster Development standards pursuant to Code § 59-C-1.53.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: As there are no similar or accessory apartment uses in the general neighborhood or immediate vicinity of the subject property, the Hearing Examiner finds that the proposed special exception will not create an excessive concentration of similar uses.

- (3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*
- (i) *More spaces are required to supplement on-street parking; or*
  - (ii) *Adequate on-street parking permits fewer off-street spaces.*
- Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As discussed in Part II.D of this report, there are at least four (4) off-street parking spaces on driveway and two parking spaces in the two-car garage and ample on-street parking. The Hearing Examiner concurs with Technical Staff finding that “[a]dequate parking exists for this accessory apartment.” Exhibit 15, p. 13. The Hearing Examiner so finds.

#### **D. Additional Applicable Standards**

##### **59-G § 1.23. General development standards.**

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-90 Zone, which permits the proposed

use by special exception. As noted by Technical Staff (Exhibit 15, p. 7), “The site is located in the R-90 Zone, and developed as a Cluster Development. A comparison of the R-90 Zone Cluster Development standards with the applicant’s proposal is in Table 1. Staff finds that the proposed special exception application meets the required development standards of the zone.”

The following table from page 8 of the Staff report (Exhibit 15) lists the applicable standards and the existing measurements for the subject site:

**Table 1: Applicable Development Standards – R-90 Zone (Cluster Development**

Development Standards – R-90/Acc. Apt. (§59-C-1.53)	Requirement	Provided
Maximum Building Height:	3 stories or 40 ft.	2 story
Minimum Lot Area	5,000 sq. ft.	8,050 sq. ft.
Minimum Width at Proposed Street Line:	25 ft.	±147 ft.
Minimum Front Yard Setback:	25 ft.	±30 ft.
Minimum Side Yard Setback:	0	±5 ft.
Minimum Rear Yard Setback:	30 ft. from any boundary line of the subdivision	±30 ft. (from lot line)
Maximum Floor Area for Accessory Apartment	1,200 sq. ft. or less than 50% of GFA	±943 sq. ft. (31%)

*(b) **Parking requirements.** Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed in Part II.D of this report, there are at least four (4) off-street parking spaces on driveway and two parking spaces in the two-car garage and ample on-street parking. The Hearing Examiner concurs with Technical Staff

finding that “[a]dequate parking exists for this accessory apartment.” Exhibit 15, p. 13. Further, the Hearing Examiner concurs with Staff that “proposed special exception request meets the parking requirements of Article 59-E.”

The Hearing Examiner so finds.

(c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor;*
- (2) *Sand, gravel or clay pits, rock or stone quarries;*
- (3) *Sawmill;*
- (4) *Cemetery, animal;*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities;*
- (6) *Equestrian facility;*
- (7) *Heliport and helistop.*

Conclusion: The special exception is not included in the above list and is therefore, not applicable. The proposed use will not result in any change in the site’s frontage, which satisfies the minimum frontage requirements of the R-90 Zone.

(d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: As discussed in Part II. F of this report, the property is subject to an approved Final Forest Conservation Plan as defined by Chapter 22A and is adjacent to a Category I Conservation easement. Technical Staff noted, “[t]here are no forest conservation issues identified with the proposed use.

[] There is no proposed construction and the proposed special exception does not conflict with the approved Final Forest Conservation Plan.”

Exhibit 15, p. 9. Based on this evidence, and having no evidence in the record to the contrary, the Hearing Examiner finds that Petitioner’s request will have no adverse environmental impacts and concurs with Staff’s finding that it does not conflict with the approved Final Forest Conservation Plan.

*(e) **Water quality plan.** If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This section pertains only to sites in special protection areas, where water quality plans are required. This site is not within an SPA.

*(f) **Signs.** The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner has not proposed any signs.

*(g) **Building compatibility in residential zones.** Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external modifications or changes to the existing dwelling to accommodate the accessory apartment. Thus, the existing dwelling will

maintain its residential appearance of a single-family detached home compatible with the R-90 Zone.

(h) ***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “the entrance to the accessory apartment is illuminated with typical residential outdoor lighting [and] no direct light would intrude into any adjacent residential property.” Exhibit 15, p. 9. No new lighting will be added. The Hearing Examiner agrees with Technical Staff that the outdoor lighting is residential in character and finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that the Petition of Belay Tesfamariam, BOA No. S-2833, which seeks a special exception for an accessory apartment to be located at 1000 Heartfields Drive, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must comply with the conditions set forth in the Memorandum of Timothy Pillgreen, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 16):
  - a. Install electric stove in kitchen.

- b. The Accessory Apartment is 538 square feet. 150 square feet for the first person and 100 square feet for each [additional] person. A family of three or two unrelated people may live in the unit.
  - c. There is off-street parking for 4 vehicles.
3. Petitioner must comply with DHCA's determination of the maximum permitted occupancy for the accessory apartment (i.e., the accessory apartment may be occupied by no more than two (2) unrelated persons, or a family not to exceed three (3) people), and other DHCA directives needed to ensure that the accessory apartment is maintained up to Code, as listed in Exhibit 16;
4. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons, or where there is a guest room for rent, a boardinghouse or registered living unit;
6. Petitioner must not receive compensation for the occupancy of more than one dwelling unit;
7. Petitioner must make parking spaces available for his accessory apartment tenants, either off-street (on the driveway) or on the street directly in front of Petitioner's home; and
8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 26, 2012

Respectfully submitted,

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Tammy J. CitaraManis  
Hearing Examiner